The omission or failure to take into consideration a factor such as this constitutes, in our view, a serious misdirection as to occasion a failure of justice. Such a misdirection goes to the root of the matter and it materially affects the very foundation upon which the learned Judge grounded his findings. In our view on this count alone is sufficient for this Court to interfere with such findings.

In the light of what we have stated sufficient grounds exist for us to say, without considering other unsatisfactory features of the case, that the appellant's conviction on the second charge cannot possibly stand and accordingly we allow the appeal on the second charge. The conviction is quashed, and the appellant is acquitted and discharged.

*Conviction quashed;*
*Appellant acquitted & discharged.*

Solicitors: *Ee & Lim.*

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## MERIAM BINTI YAACOB & ORS. v. SHELL MALAYSIA TRADING SDN. BHD.

**[F.C. (Salleh Abas C.J. (Malaya), Abdul Hamid & Syed Agil Barakbah F.JJ.) November 15, 1983 & January 20, 1984]**

**[Kuala Lumpur – Federal Court Civil Appeal No. 78 of 1983]**

*Practice & Procedure – Execution – Application for sale of land – Prohibitory order – Whether prohibitory order validly effected – National Land Code, s. 334.*

*Land Law – Execution – Application for sale of land – Prohibitory order – Whether prohibitory order validly effected.*

In this case the fourth appellant, one Mohamed Kunjoo, had obtained judgment for some $60,000/– against K.K. Enterprises. He commenced execution proceedings seeking an order of sale of land registered in the name of the first appellant, Meriam, a partner of K.K. Enterprise. Subsequently an application was made by Union Chemicals to intervene in the application for execution in respect of the land on the ground that Meriam held the land in trust for Union Chemicals. It was ordered that Union Chemicals should state its claim by filing a defence and it was directed if they failed to do so, the execution should proceed. No defence was filed by Union Chemicals. They had filed a caveat but on account of their failure to comply with the order the caveat was removed.

Kunjoo then asked for an order of sale by private treaty and an order was obtained. It was then found that the respondents had caused a prohibitory order to be issued against the land. The respondents had obtained judgment against Union Chemicals for $64,000/–. In the execution proceedings brought by the respondents an order was made to issue a prohibitory order and they were to proceed against Union Chemicals on the basis that Meriam held the land in trust for Union Chemicals. The respondents issued a writ and asked for a declaration that the land at all relevant times was held by Meriam for Union Chemicals. The fourth appellant, Kunjoo, applied to have the writ set aside on the grounds that the respondents had no *locus standi* and/or as being an abuse of the process of the court. It was agreed that the prohibitory order should be vacated to enable the land to be sold, the proceeds of sale to be deposited in court until final order. Kunjoo also applied that the balance of moneys be paid to him towards the judgment obtained by him. The respondents on the other hand applied for the balance to be paid to them in satisfaction of their judgment against Union Chemicals.

The learned judge dismissed both the applications of Kunjoo. Kunjoo appealed.

**Held:** (1) on the uncontroverted facts it is abundantly plain that the onus was upon Union Chemicals to establish that Meriam held the land in trust for them. They did not pursue the claim, indeed abandoned it. It could not therefore be said that Meriam was the trustee of the Union Chemicals;

(2) Union Chemicals could no longer be said to be an equitable owner of the property as they had ceased to have any equitable interest therein. There was therefore no interest of the judgment debtor for the respondents to attach;

(3) as Union Chemicals had ceased to have any interest whatsoever in the land the registration of the prohibitory order on the strength of an alleged or purported interest of an equitable owner in land could not be said to have been validly effected and would not have any legal effect;

(4) the respondents could and ought to have intervened during the pending proceedings of Union Chemical's intervention. Having failed to do that, they missed the boat and it was too late to seek relitigation of the matter after Union Chemical's right had been finally extinguished;

(5) the appeal should therefore be allowed. The orders of the learned judge should be reversed and the applications of Kunjoo allowed.

*Cases referred to:*

1. *Reference by Registrar of Titles* [1935] M.L.J. 287.
2. *Boase* v. *Cluny Rubber Estates Ltd. & Ors.* [1913] 2 F.M.S.L.R. 130.
3. *Motor Emporium* v. *Arumugam* [1933] M.L.J. 276.
4. *Karuppiah Chettiar* v. *Subramaniam* [1971] 2 M.L.J. 116.

FEDERAL COURT.

*Shah Balendran* for the appellant.
*S. Sivasubramanian* for the respondent.

*Cur. Adv. Vult.*

**Abdul Hamid F.J.** (delivering the Judgment of the Court): The appeal is against the order of the

learned Judge sitting at the High Court Kuantan dismissing two applications: first, enclosure 12 in Civil Suit No. 129 of 1982 and second, enclosure 15 in Originating Summons No. 45 of 1982.

*Enclosure 12 Civil Suit No. 129/82*

This is an application by Mohamed Kunjoo (we shall call Kunjoo) the fourth defendant in the above Civil Suit for an order that the writ in that action of which Shell Malaysia Trading Bhd. (we shall call Shell) was plaintiff be set aside on the grounds that Shell had no *locus standi* and/or as being an abuse of the process of court. (We refer to this application as setting aside application).

*Enclosure 15 Originating Summons No. 45/82*

Application by Kunjoo that the balance of money held by court be given to him towards the judgment obtained against K.K. Enterprise. (We refer to this application as balance payment application).

*Background*

In order to appreciate the background of this case, it seems necessary to set out the circumstances leading to the order made by the learned Judge. As far as possible they will be set out in a chronological order up to the date of the order – subject of this appeal. As a starting point we refer to Civil Suit No. 336/77 where on July 31, 1978 Kunjoo as plaintiff obtained judgment against K.K. Enterprise for some $60,000/–. On October 13, 1978, Kunjoo commenced execution proceedings seeking order for sale of Lot 5965 registered in the name of Meriam as registered owner, a partner of K.K. Enterprise. On October 5, 1978 an application was made by Union Chemicals (we shall call U.C.) to intervene in the application for execution in respect of the land on the ground that Meriam held it in trust for U.C. There was a stay of sale pending hearing of U.C.'s application. Kunjoo appealed against the order but later withdrew it. On December 16, 1981, the court heard the summons for direction of further conduct of the execution proceedings. It was ordered that U.C. would state its claim by filing a defence before March 9, 1981, and Kunjoo to reply before March 31, 1981. There was a further direction that the execution would proceed if U.C. should fail to comply with the direction. It is common ground that no defence was filed. It is also common ground that U.C. lodged a caveat earlier but on account of the failure to comply with the order the caveat was removed on February 10, 1982 and the sale was to take place pursuant to the order made on October 30, 1978.

Kunjoo then asked for an order of sale to be by private treaty. An order was obtained. The purchasers deposited the full amount of $200,000/–. It was then discovered that the memorandum of transfer could not be registered by reason of some impediment, namely, that Shell had caused a prohibitory order to be issued which order was registered on February 28, 1982.

It is further common ground that Shell obtained judgment against U.C. for $64,000/–. In the execution proceedings an order was made to issue a prohibitory order and Shell was to proceed against U.C. on the basis that Meriam held the land in trust for U.C.

On May 13, 1982, Shell issued a writ against Meriam, U.C., Malaysia Building Society (we shall call M.B.S.) and Kunjoo. Shell has asked for a declaration that the land at all relevant times was held by Meriam in trust for U.C.

On July 2, 1982, Kunjoo applied to set aside the writ issued by Shell claiming that Shell had no *locus standi*. It is Kunjoo's contention that there was a peremptory order against U.C. and having failed to comply with the order U.C. had therefore lost the right to any claim. It is asserted by Kunjoo that Shell's right depended on U.C.'s right and as such Shell was not entitled to the claim. It is also asserted by Kunjoo that Shell's prohibitory order could not have been registered in respect of a beneficial interest by a person who did not have a registrable interest.

Meanwhile Kunjoo also took out O.S. No. 45/82 against Shell asking for an order that the writ of seizure and sale and the prohibitory order of February 27, 1982 be removed from the Register.

On June 17, 1982, at the hearing of O.S. No. 45/82 upon a proposal by Shah Balendran for Kunjoo that the prohibitory order be vacated and the purchasers be registered as proprietors and $200,000/– be held by court until finalisation of O.S. No. 45/82 Orders to that effect were made although objected to, somewhat weakly, by Shell.

There was another application by Kunjoo. He asked that the balance of money be given to him towards the judgment obtained against K.K. Enterprise. This was opposed by Shell. Shell also asked that the balance be given to them towards satisfaction of judgment against U.C. Shell asserted there should be no disposal until after C.S. No. 129/82 is heard.

It seems proper to observe at this point that Meriam the registered owner died and U.C. made no appearance, and for obvious reasons, M.B.S. ceased to have interest. The only person interested apart from Shell is Kunjoo.

Kunjoo's contention is that U.C. had opportunity to substantiate their claim when they were allowed to intervene but did not do so after directions by the court. There was a breach of the directions and they therefore lost their right. For this reason neither U.C. nor Shell would be entitled to claim.

*Joint Hearing of Both Applications*

The learned Judge heard both applications and dismissed them. He ordered the issue as to the entitlement of the balance of the purchase price of the land held in the name of the Senior Assistant Registrar Kuantan in the Hongkong and Shanghai Banking Corporation to be adjudicated upon after the disposal of Civil Suit No. 129/82.

The learned Judge was of the view that there was no merit in the appellant's contention that the prohibitory order could not be registered in respect of beneficial interest of a person who does not have a registrable interest as was decided in the case reported as *Reference by Registrar of Titles Selangor*[1] He said that the judgment in that case was based on the interpretation of sec. 108 of the F.M.S. Land Code 1926 which refers to "any land or any registered interest in land ..." He however saw merit in the respondent's contention for the reason that in the equivalent section under the National Land Code, sec. 334, the word "registered" has been omitted and this is significant. Section 334 National Land Code reads:

"334. In this Chapter 'prohibitory order' means, where land or an interest in land held by a judgment-debtor is to be sold in execution proceedings, an order made pursuant to rules of court by a court of competent jurisdiction prohibiting the judgment-debtor from effecting any dealing therewith or from effecting such dealing therewith as may be specified in the order."

The learned Judge relied on three cases cited by him in his judgment – *Boase* v. *Cluny Rubber Estates Ltd. & Ors.*,[2] *The Motor Emporium* v. *Arumugam*[3] and *Karuppiah Chettiar* v. *Subramaniam*[4] and said that they make the position clear to the effect that

"Although a person is the registered proprietor of land if in fact he had given up his interest in the land and was a bare trustee for the equitable owner, a judgment creditor of such a trustee may not move against the land simply because the judgment debtor happens to be the registered proprietor.

It follows, and I so hold, that a judgment creditor of the equitable owner may move against the land although the equitable owner does not have a registered interest in the land if the trust that created the equity is perfect and complete."

We find it difficult to comprehend the learned Judge's reasoning and the basis of his finding that the principle enunciated supports the respondent's contention. If we are right in our assumption, the learned Judge seems to have proceeded upon the basis – (a) since Meriam the registered proprietor and trustee had given up interest in the land, she was therefore a bare trustee for U.C. the equitable owner; and in that event a judgment creditor of Meriam may not move against the land even though Meriam as judgment debtor was the registered proprietor; (b) that Shell the judgment creditor of U.C. (equitable owner) may move against the land even though U.C. did not have registered interest in the land if the trust that created the equity is perfect and complete.

In the course of the judgment the learned Judge also had this to say –

"... it is clear that as against Mohamed Kunjoo certainly, Union have lost forever the right to establish their claim to the property, the registered proprietor whereof is Meriam.

But it is not Union that now seeks to establish their equitable ownership to the land but Shell, a creditor of Union. Encik Sivasubramanian argues that at best the breach of the peremptory orders prohibits Union and Union alone, from reviving their claim to the land.

In my judgment the breach of the peremptory orders has not had the effect of extinguishing Union's alleged interest in the land. The effect of the breach is limited to a prohibition by Union from pursuing with the claim to the equitable ownership of the land as against Mohamed Kunjoo's attachment of the land pursuant to execution proceedings."

The learned Judge is in fact saying that whilst U.C. have lost completely the right to establish

their claim to the property, Shell as a judgment creditor of U.C. can seek to establish their equitable ownership to the land. The breach of the peremptory order prohibits U.C. alone and not Shell, from reviving the claim to the land.

We have examined the cases cited by the learned Judge and, with respect, we do not think they make the position clear in so far as Shell's right to move against the land. In *Boase* v. *Cluny Rubber Estates Ltd. & Ors. (supra),* the decision was to the effect that the land (the interest of such land was before and in consideration of the intended marriage, purported to be transferred by the appellant's husband to the appellant) could not be attached by the creditors of the husband as the husband has no disposing power over the land which he could exercise for his own benefit.

In *The Motor Emporium* v. *Arumugam (supra),* a decision of the High Court, it was held that an execution creditor can only attach an interest in property to which at the time of attachment the creditor was beneficially entitled.

The decision of the Federal Court in *Karuppiah Chettiar* v. *Subramaniam (supra)* provides authority for the proposition that a judgment debtor of a bare trustee could only take whatever interest the debtor had and not against any interest in land the debtor had already parted with.

In our view, the learned Judge erred in law in failing to appreciate the issues at hand and cannot be said to have considered them in their proper perspective.

One of the questions that necessarily arose for determination was whether Meriam was a trustee. The learned Judge proceeded on the basis indeed assumed that Meriam was a trustee or a bare trustee of the equitable owner. The issue was effectively between Kunjoo and U.C. The claim that Meriam held the land in trust could only have come from U.C. Thus when U.C. intervened in the execution proceedings it was solely on the basis that Meriam was a trustee. But as is evident from the record U.C. failed to pursue their claim. U.C. had not only breached the peremptory order but by their conduct had clearly demonstrated that they had no further wish to proceed with the claim.

There was a court order to the effect that in the event U.C. should fail to proceed as directed a stay of execution shall be deemed to have been rescinded and executions were to be proceeded on. More importantly, however, it is clear that the caveat filed by U.C. earlier was finally ordered to be removed on application by the appellant.

On the uncontroverted facts it is abundantly plain that the onus was upon U.C. to establish that Meriam was holding the land in trust for them. They did not pursue that claim indeed, but abandoned it. We do not therefore see how it can be said that Meriam was the trustee of U.C.

The next question for consideration is what interest in the land did U.C. have after their failure to pursue the claim? There seems to be none whatsoever, equitable or otherwise. If U.C. had no interest remaining equitable or otherwise, could Shell move against the land as judgment creditor of U.C.? U.C. could no longer be said to be an equitable owner of any property as they ceased to have any equitable interest therein. There was therefore no interest of the judgment debtor for Shell to attach.

It would appear clear to us, and it was so found by the learned Judge, that as against the appellant U.C. have lost the right to establish their claim to the registered property, of which Meriam was the registered proprietor. And for that reason any purported interest by U.C. in the land would have been completely extinguished. In that event we are unable to see how Shell could step into the shoes of U.C. and seek to establish any equitable ownership to the land. It may well be Shell is a judgment creditor of U.C. and in law could follow the assets of U.C. to execute their claim but strictly they could only do so if U.C.'s right was established or, at the very least, it was pending adjudication but certainly not if their right or interest had finally ceased to exist.

The learned Judge stated in his judgment that the breach of the peremptory orders has not had the effect of extinguishing U.C.'s alleged interest in the land. The effect of the breach is limited to a prohibition by U.C. from pursuing with the claim to the equitable ownership of the land. In our view, the question of U.C. pursuing the claim to the equitable ownership as against the appellant no longer arises for the simple reason that U.C. had already abandoned the claim. For this reason we form the view that Shell could not lay its claim on the alleged or purported interest of U.C. There was none.

It is to be observed that in so deciding that Shell was not prohibited from moving against the land as judgment creditor of U.C. the learned Judge also proceeded on the assumption that the trust that created the equity was perfect and complete.

We are inclined to think that the learned Judge misdirected himself in this issue. We find it difficult to see how this question could still arise. We say this at the risk of repetition, principally for the reason that the claim to the purported trust, if any, had completely ceased to exist. If therefore Shell's claim was founded essentially upon the alleged trust and this question has since ceased to exist, can it be said that it was still open to Shell to seek in law the adjudication of that issue notwithstanding that the party whose alleged or purported interest has since abandoned that claim? We think not.

We are by no means satisfied on the facts obtaining and upon those we adverted to earlier that the learned Judge was right when he held that the breach of the peremptory orders had the effect of extinguishing only U.C.'s alleged interest in the land and it was only limited to a prohibition by U.C. alone from pursuing with the claim to equitable ownership of the land as against the appellant. It is also common ground that Shell's prohibitory order was only registered on March 9, 1982 at which time U.C.'s right to any interest in land or purported interest in land on an alleged and purported trust had already been finally and completely extinguished.

If therefore U.C. had ceased to have interest whatsoever in the land, the registration of the prohibitory order on the strength of an alleged or purported interest of an equitable owner in land could not, in our view, be said to have been validly effected and would not have had any legal effect.

*Contumelious conduct and an abuse of the process of the court*

When we speak of contumelious conduct, it is strictly related to the conduct of U.C. In so far as U.C. was concerned, it is clearly established that they breached the peremptory order and the application was struck off for contumelious conduct. Although the question is no longer in issue as it is essentially and effectively an issue between the appellant and U.C., it is only relevant in so far as Shell is concerned, basically, because they purported to step into the shoes of U.C.

Facts reveal and it is not in dispute that Shell knew and indeed the solicitors for Shell admitted that U.C. had intervened but did nothing. Shell waited for the decision of the court as to whose property it was before moving in and they moved only after realising U.C. had been ousted, i.e. after U.C.'s right had ceased to exist.

We do not see the necessity to labour on this point in the light of what we have stated earlier.

We see merit in the appellant's contention that Shell could and ought to have intervened during the pending proceedings of U.C.'s intervention. We refrain from speculating but would venture to say that if Shell had timely intervened it could be said that they had properly stepped into the shoes of U.C. Having failed to do that, Shell missed the boat and it was too late to seek relitigation of the matter after U.C.'s right had been finally extinguished. In the light of the foregoing we are not satisfied that the decision of the learned Judge could be upheld.

Accordingly we allow the appeal and reverse the order of the learned Judge, Kunjoo's application (Enc. 15 in O.S. 45/82) is allowed with costs. As for the application in Encl. 12 in C.S. 129/82, we set aside the order, and in so far as it is applicable to the appellant, allow it with costs.

*Appeal allowed.*

Solicitors: *Balendran Chong & Bodi; S. Sivasubramanian.*

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## NG TIOU HONG v. COLLECTOR OF LAND REVENUE, GOMBAK

**[F.C. (Salleh Abas C.J (Malaya), Hashim Yeop A. Sani & Syed Agil Barakbah F.JJ) January 11 & March 13, 1984]**

**[Kuala Lumpur – Federal Court Civil Appeal No. 37 of 1983]**

*Land Law – Land Acquisition – Valuation – Method adopted in arriving at valuation.*

In this case the Selangor State Government decided to acquire a piece of land in Gombak consisting of 147 acres and owned by 14 co-proprietors in undivided shares. The Collector of Land revenue held an enquiry and assessed the whole of the land in the sum of $2,219,620.00 at